85-462

No.

Supreme Court, U.S.
FILED
SEP 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

LEO M. MULLEN,
Petitioner,

vs.

ROBERT B. SKINNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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29 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals incorrectly affirm the District Court's Dismissal with Prejudice of Petitioner's civil action, in that Petitioner had dutifully prosecuted the action, no continuance had ever been requested, no discovery order entered, no pre-trial conference was ever held, no trial date set, and Appellant had complied with all orders in a timely fashion.

PARTIES TO THE PROCEEDINGS

The Petitioner is Dr. Leo M. Mullen, a licensed physician in Kansas City, Missouri who instituted this action in March, 1980 alleging that the Respondent, Robert B. Skinner, had been guilty of malpractice in his legal representation of the Appellant in a West Virginia state court proceeding.

The Respondent, Robert B. Skinner, is a licensed attorney in the State of West Virginia, with his offices in Charlestown, West Virginia.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

LEO M. MULLEN,
Petitioner,

vs.

ROBERT B. SKINNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The December 28, 1984 Order of the United States District Court for the Northern District of West Virginia (per Judge Robert E. Maxwell) is unreported and set forth as Appendix "A" to this Petition for Writ of Certiorari filed by LEO M. MULLEN, Petitioner, in this case. Petitioner appealed from this order to the United States Court of Appeals for the Fourth Circuit.

Also included are three subsequent orders of the District Court denying rehearing and other relief.

The Opinion, per curiam, of the United States Court of Appeals for the Fourth Circuit affirming the decision of the District Court is set forth in Appendix "B" to the Petition for Writ of Certiorari filed by Petitioner, as is the opinion denying rehearing of June 20, 1985.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals denying rehearing was entered June 20, 1985.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On March 27, 1980, Petitioner Leo M. Mullen of Kansas City, Missouri filed a complaint in the United States District Court of the Northern District of West Virginia, against Robert B. Skinner, Esquire and Douglas S. Rockwell, Esquire, seeking compensatory and punitive damages for alleged legal malpractice. The complaint arose from the alleged failure of attorneys Skinner and Rockwell to adequately represent Petitioner in two actions filed in the Circuit Court of Jefferson County, West Virginia. On December 10, 1980, pursuant to motions by Defendants in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, the District Court dismissed the complaint with leave to amend for failurue to state an adequate jurisdictional basis. The Complaint was properly amended; however, the District Court dismissed with prejudice the complaint with respect to Douglas S. Rockwell, Esquire, finding no legal basis for the action. The Petitioner has not challenged the dismissal of Defendant Rockwell.

On August 17, 1982, the District Court entered an order pursuant to Local Rule 2.09 and Rule 41(b) of the FRCP, that Petitioner, to prevent dismissal, submit within thirty (30) days, a written statement of an intent to prosecute. On September 15, 1982, Attorney Peter J.

Koppe, Petitioner's Missouri attorney, filed such a notice of intent to prosecute.

In March 1983, attorney Robert H. McWilliams of Morgantown, W.Va. filed a notice of appearance as local counsel on behalf of Petitioner Mullen. On October 19, 1984, attorney McWilliams filed a motion to withdraw as counsel for Dr. Mullen, citing among other reasons, Mullen's alleged interference with the progression of the case. He claimed that Mullen prevented him from conducting discovery from March 1983 through August 1984.

On October 29, 1984, the District Court ordered Petitioner to appear personally before the Court on December 19, 1984, to show cause why the action should not be dismissed for failure to prosecute. On December 19, 1984, Dr. Mullen did not appear personally, but was represented by Koppe and McWilliams. Attorney Koppe tendered to the Court a letter from a physician regarding the medical condition of Dr. Mullen, and offered such a letter as explanation of the Petitioner's whereabouts. The letter stated that Dr. Mullen was suffering from hypertension resulting from pushing a disabled automobile.

During the hearing, Petitioner's counsel, McWilliams, stated that despite his advice to Mullen, that discovery was necessary to prepare for trial, Mullen forbade him from doing any other work other than the submission of a settlement offer.

McWilliams did state that Mullen had sent him a check with instructions to depose Skinner, the defendant, but that McWilliams viewed it as too little, too late.

Based on the record and statements of counsel at the hearing, the District Court dismissed Petitioner's action with prejudice, concluding:

(1) that Plaintiff's attorneys had done everything "humanly and professionally possible" to represent plaintiff, and

(2) that the prosecution of the case had been thwarted by the deliberate acts of Plaintiff, and

(3) that the primary goal of Plaintiff appeared to be to force settlement rather than vindicate an alleged wrong.

Furthermore, the District Court granted Robert McWilliams' Motion to Withdraw, and granted Peter Koppe's Motion to Withdraw, treating Koppe's comments at the 12-19 hearing as an oral motion.

On January 22, 1985, the District Court denied Petitioner's "Motion for Hearing on Criminal Charges against Robert McWilliams" and "Motion for Change of Judge".

Plaintiff Mullen, pro se, appealed the action to the United States Court of Appeals, Fourth Circuit.

On May 13, 1985, the per curiam opinion of the Court of Appeals was entered. No oral arguments were permitted, and the Court refused without notice an Amicus Curiae brief. The per curiam order concluded that:

> Under Rule 41(b), the district court can dismiss a case with prejudice on its own motion for failure to prosecute. *Link v. Wabash RR. Co.* 370 U.S. 626, 629-31 (1962); *Davis v. Williams* 588 F2d 69, 70 (4th Circuit 1978) and others. In *Davis,* the Court established this balancing test: "A Dismissal with prejudice is a harsh sanction which should not be invoked lightly in view of the sound policy of deciding cases on their merits. Against this policy, the district court must balance considerations of sound judicial administration, applying four criteria: (1) the degree of

> personal responsibility on the part of the plaintiff; (2) the amount of prejudice to the defendant caused by the delay; (3) the presence or absence of a drawn out history of deliberately proceeding in a dilatory fashion and (4) the effectiveness of sanctions less drastic than dismissal. . .

Upon review of the record, and the materials before this Court, we conclude that the District Court did not abuse its discretion when it dismissed this action pursuant to Rule 41(b), and we accordingly affirm the judgment below. Because of the dispositive issues recently have been decided authoritatively, we dispense with oral arguments. AFFIRMED.

Petitioner, LEO M. MULLEN, filed a pro se Petition for Rehearing, and it was summarily denied on June 20, 1985.

REASON FOR GRANTING THE WRIT

Certiorari Should Be Granted Because the Decision of the Court of Appeals, in Holding That the District Court Properly Dismissed Appellant's Action, Conflicts With Other Decisions of Other Circuits of the Court of Appeals, and This Court's Decision in Link v. Wabash RR Co., 370 U.S. 626, 82 S.Ct. 1386 (1962). . .

Under Rule 41(b), FRCP, the Judge of the District Court has broad authority over the dismissal of actions for "failure to prosecute". Obviously, the Courts have an interest in preventing delay and controlling its calendar of cases, but in every case, such interests of the Court must be weighed against the rule of law which favors disposition "on the merits". *Dyotherm Corp. v. Turbo Machine Co.*, 392 F2d 146 (1968 CA3, Pa.)

In the matter herein, the case had been pending some four to five years. However long that may seem at first blush, many, many less complicated cases remain on the docket in the same court for much longer lengths of time. There are always alternatives to dismissal. *Industrial Bldg. Materials Inc. v. Interchemical Corp.*, 453 F2d 347 (1972 CA7, Tex.) and *Pond v. Braniff Airways,* 453 F2d 347 (1972 CA7, Tex.).

The District Court could have set the matter for trial. It did not. In fact, Mullen indicated Petitioner's intent and desire to set the matter for trial and he was ignored. In 1982, counsel for Mullen had suggested in its September 8, 1982, "Notice of Intent to Prosecute Case" that "in accordance with the order of August 17, 1982, I do hereby notify the Court and his Honor, Robert Maxwell, that it is my desire to further prosecute the claim set forth in the complaint above, that being Civil Action No. 80-13-M, filed March 27, 1980. PLEASE SET THIS CASE FOR TRIAL AT THE EARLIEST CONVENIENCE." (Emphasis added)

That Court informed attorney Koppe by telephone in August, 1982 that the matter would be tried in Martinsburg, West Virginia in the month of May, 1983. In further corroboration, Magistrate David Core, during his November, 1984 telephone call to all attorneys in the case, said that he had been assigned the file for a pre-trial conference in 1983, but didn't much like the idea and just let the case file sit.

Obviously, the Court was in no great hurry in 1983 to proceed to trial in this matter. The question then can be posed, why push the matter to dismissal with prejudice a year later, when no order for any discovery or any trial setting has been made?

Not many explanations are available. One might be that Judge Maxwell viewed Dr. Mullen's non-appearance on 12-19-84 as justification for dismissal. Clearly, Dr. Mullen was under doctor's care at that time and not able to travel over 1,000 miles. He was represented by two lawyers at the time of the hearing—one, Mr. McWilliams was striving mightily to withdraw, and the other, concerned that the Court not allow McWilliams to do so without other local counsel first entering his appearance, making the point that "due to Mullen's lack of funds, it would be impossible for me to handle the case from Kansas City."

The Court treated both comments as motions by the attorneys to withdraw and entered orders allowing both to withdraw and then dismissed the case with prejudice.

The allegations of McWilliams regarding the inability of McWilliams to get Mullen to authorize discovery do not justify dismissal with prejudice.

(1) The federal rules do not require a party to agree with or follow the advice of counsel. Counsel's opinion as to what should be done in an action is advisory—and in the last analysis, the client decides how the case proceeds. No federal rule *requires* the any party conduct discovery. The Court never requested a Rule 16 order on discovery. The only proposed filing ever requested by the court was submitted by Petitioner's attorney in December, 1982, and was rejected by the Court. No further pre-trial order was ever required.

(2) It is, at the very least, incorrect to state that "counsel has not been allowed to conduct any type of pre-trial preparation since March, 1983. McWilliams comments were contrary to evidence adduced

at hearing that McWilliams had tried without success to get a transcript of the Jefferson County proceedings, after Mullen had paid the court reporter. In addition, a check for $750.00 was sent to McWilliams for the deposition of Skinner but McWilliams deferred that it was too little, too late, and he was too busy trying felony public defender cases. Additionally, federal rules do not make discovery mandatory, and if the Court wanted to know when discovery would take place, it could have called for a Rule 26(f) Discovery conference. It did not.

(3) Plaintiff did not thwart the good faith effort of his counsel. He may have disagreed with counsel, even argued with counsel, but Plaintiff had his own ideas of how to conduct his case, and that was, and should be, his right as Plaintiff.

With the exception of appearing in Court on that fateful day in December, 1984, when he was ill, Petitioner did everything requested him by the Court. To force the Petitioner to attend ill, 1,000 miles from home in the middle of the West Virginia hill country or face dismissal is a harsh, unjustified and reprehensible action.

The law favors disposition on the merits, and well it should, and dismissal is a harsh sanction, to be resorted to only in extreme cases. *Beker v. Rezley,* 324 F2d 269 (1963 CA10, Okla.) and *Becker v. Safelite Glass Co.,* 244 F.Supp. 625 (1965, DC Kan.).

In fact, in *Glo Co. v. Murchison and Co.,* 397 F2d 928 (1967 CA3, Del.), the Court of Appeals held that, "although dismissal of a case for lack of prosecution appeared to be justified by inaction of counsel in failing to move for trial after repeated warnings by Court, trial judges' dismissal would be reversed since his was an extremely harsh penalty for such delay."

Clearly, the test for appellate review is whether the Court's action was an abuse of his discretionary powers. "Unless it appears that there has been an abuse of discretion on the part of the trial court in dismissing the action, it's decision will not be disturbed on appeal." *Hicks v. Bekins Moving and Storage Co.*, 115 F2d 406, (1940 CA9, Wash.). Also *Tinkoff v. Jarecks*, 208 F2d 861 (1952 CA7, Ill.) and *Flaska v. Little River*, 389 F2d 885 (1968 CA5, Fla.), cert. den., 392 U.S. 928 (1969).

Other cases have, while noting that dismissal is a discretionary matter, generally permitted it, only in the face of a clear record of delay, generally permitted it, only in the face of a clear record of delay or contumacious conduct by plaintiff, *Durham v. Florida E.C. RR Co.*, 395 F2d 366 (1967 CA5, Fla.) and *Reizakis v. Loy*, 490 F2d 1132 (1974 CA4, Vir.).

Petitioner had every legal right to ignore the advice of counsel or to disagree with it. Obviously, to do so would require him to proceed at his own peril.

One of the perils, however, that Petitioner should not have had to face was District Judge Maxwell who felt that his failure to cooperate with his attorney in West Virginia was grounds for dismissal with prejudice.

Recent Court of Appeals decisions have faced the question of dismissal as a sanction for some failure to prosecute, or even to fail to comply with pre-trial orders.

In a recent pair of Third Circuit decisions, *Poulis v. State Farm Fire and Casualty Co.*, 747 F2d 863 (1984 CA3) and *Scarborough v. Eubanks*, 747 F2d 871 (1984 CA3), provide guidelines for the use of such a sanction. In both cases, the district court had issued dismissals based on the plaintiff's counsel's non-compliance with pretrial orders.

The Third Circuit affirmed the dismissal in *Poulis* an insurance action in which plaintiff's counsel failed both to file a pretrial statement and to answer interrogatories. The Court, however, reversed the dismissal in *Scarborough,* a contract action in which the same attorney as in *Poulis,* filed untimely pretrial statements that failed to obey the Court's order to specify damage claims and to list witnesses.

In each case, the third circuit used the same balancing test that the fourth circuit said it relied on in *Davis v. Williams,* and in both cases the attorney provided a similar explanation for dilatory conduct. In neither case did the Third Circuit find counsel guilty of wilful misconduct. The distinction the Court made in affirming *Poulis* and reversing *Scarborough* lay in the "pattern" of dilatory conduct in *Poulis.* This element was lacking in *Scarborough.*

This Court, in *Link v. Wabash RR Co.*, 370 U.S. 626 (1962) [cited by the 4th Circuit in its per curiam opinion], addressed the issue of dismissal by the Court on its own motion for failure to prosecute. Even conceding that any part of the delay in this case was caused by Mullen's action or inaction, the ground rules laid down by *Link* do not call for dismissal.

The District Court of Northern West Virginia had utterly failed to enter any order compelling discovery or setting schedules as called for in the federal rules of civil procedure. Any interest they had in the prompt trial of this action is not evident on the record. No pre-trial conference, no discovery orders, no trial setting, nor were any motions filed to be ruled on. Who was the author of delay in this matter, Leo Mullen? Or indeed, were all parties equally at fault, including the Defendants who conducted no discovery at all in four and one-half years?

Because of the Court of Appeals misplaced reliance on *Link v. Wabash* and *Davis v. Williams,* and the lack of any intentional delay on the part of Petitioner, Leo M. Mullen, the decision to affirm the decision of the United States District Court for the Northern District of West Virginia is indefensible, and requires and warrants the exercise of this Court's supervisory power.

CONCLUSION

For all the foregoing reasons, Appellant LEO M. MULLEN submits that a Writ of Certiorari directed to the Court of Appeals for the Fourth Circuit should issue.

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APPENDIX "A"

(Filed December 28, 1984)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 80-0013-M

LEO M. MULLEN, MD,
Plaintiff,

v.

ROBERT R. SKINNER,
Defendant.

ORDER

On December 19, 1984, this matter came on for hearing pursuant to this Court's Order of November 29, 1984, commanding the plaintiff, Leo M. Mullen, M.D., to appear personally at such time and show cause, if such existed, why this action should not be dismissed for failure to prosecute.

At such time, the plaintiff failed to personally appear; however, he was represented by his counsel, Robert H. McWilliams and Peter J. Koppe, and the defendant, Robert R. Skinner, was represented by his counsel, Frank E. Simmerman, Jr. Thereupon, Peter J. Koppe, on behalf of Leo M. Mullen, M.D., tendered unto the Court a physician's letter regarding the medical condition of Leo M. Mullen, M.D., and offered said letter as justification for the plaintiff's failure to personally appear.

Whereupon, the Court noted that on August 17, 1982, an Order had been entered pursuant to Local Rule 2.09 and

Rule 41(b) of the Federal Rules of Civil Procedure requiring the plaintiff to submit a written statement regarding his desire to further prosecute this action. By a pleading entitled "Notice of Intent to Prosecute Case" filed September 15, 1982, the plaintiff advised the Court of his intention to prosecute this case and his desire for trial "at the earliest convenience" of the Court. It was noted by the Court that the record failed to indicate that the plaintiff had undertaken either discovery or pretrial preparation since filing his "Notice of Intent to Prosecute Case". The Court then inquired of plaintiff's counsel what steps, if any, had been undertaken to pursue resolution of this matter in the 4-1/2 years it had been pending. After considering the statements of counsel with respect to the status of this case, the Court concluded that prosecution of this civil action had been effectively thwarted by the plaintiff, Leo M. Mullen, M.D., who had directly attempted to preclude the trial of this case and had denied his counsel an opportunity to effectively prepare for trial.

It appeared to the Court that the motion of Robert H. McWilliams to withdraw as counsel for the plaintiff Leo M. Mullen, M.D. was presently pending before this Court, and predicated upon the possibility of conflict of interest arising from attorney McWilliams' position in the public defender's office, and predicated upon Leo M. Mullens' interference with the manner in which Mr. McWilliams sought to prosecute the instant civil action, the Court was of the opinion to and accordingly granted Robert H. Williams' Motion to Withdraw as counsel for the plaintiff Leo M. Mullen, M.D. It is accordingly ORDERED that Robert H. McWilliams is discharged from further service in this matter.

The Court noted that it appeared from the record hereof that Peter J. Koppe had previously been dismissed

by the plaintiff Leo M. Mullen, M.D.; however, Peter J. Koppe presently appeared in an attempt to assist the plaintiff Leo M. Mullen, M.D. The Court noted that it had previously been advised that if Robert M. McWilliams was dismissed, Peter J. Koppe would seek to withdraw as counsel for the plaintiff Leo M. Mullen. The Court then accepted Mr. Koppe's comments as an oral Motion to Withdraw and insofar as Mr. Koppe had been precluded by the plaintiff from preparing and prosecuting the instant civil action, such motion was granted. It is accordingly ORDERED that Peter J. Koppe is discharged from further service in this matter.

The Court finding that the plaintiff having failed to show cause why the instant civil action should not be dismissed for failure to prosecute as Ordered November 29, 1984, the Court is of the opinion to and it is accordingly ORDERED that the instant civil action be dismissed, with prejudice.

ENTER: December 28, 1984

/s/ Robert E. Maxwell
Judge

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST: E. LOWELL MARKEY
Clerk, U. S. District Court
Northern District of West Virginia
By: /s/ Kaye Mallow
Deputy Clerk

(Filed January 10, 1985)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 80-13-M

LEO M. MULLEN, M.D.,
Plaintiff,

v.

ROBERT E. SKINNER,
Defendant.

ORDER

The above-styled action was dismissed with prejudice for Plaintiff's failure to prosecute in a Judgment Order entered December 28, 1984. Subsequently, the Court has received from Plaintiff a letter dated December 31, 1984, a post card dated December 27, 1984, and a "Motion to Set Aside Judgment Dated 12-18-84 and Reconsider the Decision to Dismiss Peter Koppe From the Case so That Peter Koppe can try Case." To assure a complete record in the instant action, the Clerk of Court is directed to file said documents in the appropriate case file. Additionally, for reasons appearing from the record before the Court, it is

ORDERED that Plaintiff's "Motion to Set Aside Judgment Dated 12-18-84 and Reconsider the Decision to Dismiss Peter Koppe" be, and the same is hereby, DENIED.

ENTER: January 9th, 1985.

/s/ Robert E. Maxwell
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST: E. LOWELL MARKEY
Clerk, U. S. District Court
Northern District of West Virginia
By: /s/ Jo Ellen Rose
Deputy Clerk

(Filed January 23, 1985)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 80-13-M

LEO M. MULLEN, M.D.,
Plaintiff,

v.

ROBERT B. SKINNER,
Defendant.

ORDER

The above-styled action was dismissed with prejudice for Plaintiff's failure to prosecute in a Judgment Order entered December 28, 1984. In an Order entered January 10, 1985, the Court denied Plaintiff's Motion to Set Aside Judgment Dated 12-18-84 and directed the Clerk of Court to file a letter and a post card the Court had received from Plaintiff. Subsequently, the Clerk of Court filed Plaintiff's Motion for Hearing on Criminal Charges that should be filed against Robert McWilliams, two "Suggestions" received from Plaintiff, and on January 22, 1985, Plaintiff's Motion for Change of Judge and Plaintiff's Notice of Appeal. To assure a complete record in this matter, the Clerk of Court is directed to file all future correspondence received from Plaintiff in reference to this matter.

For reasons appearing from the record before the Court, it is

ORDERED that Plaintiff's Motion for Hearing on Criminal Charges that should be filed against Robert McWilliams be, and the same is hereby, DENIED. It is further

ORDERED that Plaintiff's Motion for Change of Judge be, and the same is hereby, DENIED.

ENTER: January 22, 1985.

/s/ Robert E. Maxwell
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST: E. LOWELL MARKEY
Clerk, U. S. District Court
Northern District of West Virginia
By: /s/ Jo Ellen Rose
Deputy Clerk

APPENDIX "B"

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1104

Leo M. Mullen, M.D.,
Appellant,

versus

Robert B. Skinner, and
Douglas S. Rockwell,
Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Robert E. Maxwell, District Judge. (C/A No. 80-0013-M)

Submitted: April 9, 1985 Decided: May 13, 1985

Before CHAPMAN and SNEEDEN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

(Leo M. Mullen, Appellant Pro Se. Herbert G. Underwood for Appellees.)

PER CURIAM:

Dr. Leo M. Mullen, a resident of Kansas City, Missouri, seeks to appeal the district court's order dismissing this diversity suit for failure to prosecute. *See* Fed. R. Civ. P. 41(b). On March 27, 1980, Dr. Mullen filed a pro se complaint against West Virginia attorneys Robert B.

Skinner and Douglas S. Rockwell in which he sought compensatory and punitive damages for alleged legal malpractice. Both Skinner and Rockwell filed motions to dismiss. On December 10, 1980, the district court dismissed the complaint without prejudice for failure to state an adequate jurisdictional basis. The complaint was properly amended; however, in an order filed on December 15, 1980, the district court dismissed, sua sponte, the complaint against Rockwell.

On January 16, 1981, Mullen informed the district court that he had retained Peter J. Koppe, an attorney in Kansas City, Missouri, to represent him. Following several weeks of unsuccessful attempts by Dr. Mullen to retain local counsel in West Virginia, Koppe's request for authorization to proceed without local counsel was granted on February 24, 1981. After more than a year of no progress in the case, the district court issued an order on August 17, 1982 requiring Dr. Mullen to submit a written statement indicating his intent to proceed with the case or face dismissal for failure to prosecute. On September 15, 1982, Koppe filed a notice of intent to prosecute and asked the court to set the case for trial at the earliest convenient date.

On February 18, 1983, the district court referred the matter to a United States magistrate for pretrial conference pursuant to 28 U.S.C. § 636(b)(1)(A). On March 30, 1983, Robert H. McWilliams, a West Virginia attorney, filed a notice of appearance as Koppe's sponsoring local counsel.

On October 23, 1984, McWilliams filed a motion to withdraw as counsel because he had accepted a full-time position as an assistant public defender. On November 29, 1984, the district court vacated its order referring the

case to the magistrate due to the lack of any pretrial preparation. In its order, the district court noted that "[i]t appears from the record that efforts on the part of plaintiff's counsel to prepare the case for trial have been hampered and impeded by the plaintiff's refusal to permit or authorize them to do so." Consequently, the court ordered Dr. Mullen to personally appear on December 19, 1984 and to show cause why this action should not be dismissed for failure to prosecute.

On December 19, 1984, Dr. Mullen failed to appear due to illness. He was represented, however, by Koppe. After hearing the testimony of Koppe and McWilliams concerning Dr. Mullen's refusal to accept their advice to conduct discovery, the district court permitted them to withdraw as counsel. The court further concluded that Dr. Mullen had failed to show cause and accordingly dismissed, sua sponte, the suit against Skinner for failure to prosecute. Dr. Mullen filed a timely notice of appeal and now pursues this appeal pro se.

Under Rule 41(b), the district court can dismiss a case with prejudice on its own motion for failure to prosecute. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-31 (1962); *Davis v. Williams*, 588 F.2d 69, 70 (4th Cir. 1978); *Dove v. CODESCO*, 569 F.2d 807, 810 (4th Cir. 1978). In *Davis v. Williams, supra*, this Court established the following balancing test:

> A dismissal with prejudice is a harsh sanction which should not be invoked lightly in view of "the sound public policy of deciding cases on their merits." . . . Against this policy, the district court must balance considerations of sound judicial administration, applying four criteria: (1) the degree of personal responsibility on the part of the plaintiff; (2) the amount

> of prejudice to the defendant caused by the delay; (3) the presence or absence of a "'drawn out history' of 'deliberately proceeding in a dilatory fashion;'" and (4) the effectiveness of sanctions less drastic than dismissal. . . .

588 F.2d at 70 (citations omitted). *See also McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976). The issue on review is whether the district court abused its discretion in imposing Rule 41(b) sanctions. *Davis v. Williams*, 588 F.2d at 70. Upon review of the record and the materials before the Court, we conclude that the district court did not abuse its discretion when it dismissed this action pursuant to Rule 41(b) and we accordingly affirm the judgment below. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument.

AFFIRMED.

(Filed June 20, 1985)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1104

Leo M. Mullen, M. D.,
Appellant,

versus

Robert B. Skinner and
Douglas S. Rockwell,
Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins.
Robert E. Maxwell, District Judge

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sneeden for a panel consisting of Judge Chapman, Judge Sneeden and Judge Butzner.

For the Court,

/s/ John M. Greacen
Clerk

Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-462

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LEO M. MULLEN,

Petitioner,

v.

ROBERT B. SKINNER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

I. Whether the District Court correctly dismissed Petitioner's civil action under Rule 41(b) of the Federal Rules of Civil Procedure where Petitioner failed to prosecute for over four and one-half years and deliberately thwarted efforts of his attorneys and the court to develop the case for trial?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-462

LEO M. MULLEN,

Petitioner,

v.

ROBERT B. SKINNER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Because Petitioner's statement of the case fails to contain all relevant facts and appropriate references to the record below, and contains misrepresentations, Respondent submits a complete statement of the relevant facts. Petitioner has made numerous references to statements made during a December 19, 1984 hearing in the District Court [*see* Petition at pp. 3, 7, 8] without including references to a prepared transcript of the hearing and without submitting a copy of

the transcript as an appendix. Additionally, Petitioner has discussed the contents of a November, 1984 telephone conversation between Petitioner's counsel, Respondent's counsel and a Federal Magistrate without providing any reference to the record or other factual support for Petitioner's counsel's version of the conversation. [Petition at p. 6]. Therefore, in the following statement of relevant facts, Respondent includes, for the Court's convenience, specific references to the Fourth Circuit record below.

On March 27, 1980, Petitioner Leo M. Mullen of Kansas City, Missouri, filed a complaint in the United States District Court for Northern District of West Virginia against Robert B. Skinner, Esquire, and Douglas S. Rockwell, Esquire, seeking compensatory and punitive damages for alleged legal malpractice. The complaint arose from the alleged failure of attorneys Skinner and Rockwell to adequately represent Petitioner in two actions filed in the Circuit Court of Jefferson County, West Virginia. On December 10, 1980, pursuant to motions by the Defendants in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, the District Court dismissed the complaint with leave to amend for failure to state an adequate jurisdictional basis. The complaint was properly amended; however, the District Court dismissed with prejudice the complaint with respect to Douglas S. Rockwell, Esquire, there being no legal basis for the action. Petitioner has not challenged the dismissal of Defendant Rockwell.

On August 17, 1982, because there had been "no activity of record in connection with the development of the complaint" for over two years, the District Court entered an order, pursuant to Local Rule 2.09 and Rule 4l(b) of the Federal Rules of Civil Procedure, that Petitioner, to prevent dismissal, submit within thirty days a written statement of an intent to prosecute [Order dated 8/17/82; Transcript of

Hearing, pp. 6-7]. On September 15, 1982, Peter J. Koppe, Petitioner's attorney in Missouri, filed such notice of intent to prosecute [Notice of Intent to Prosecute Case dated 9/8/82; Transcript of Hearing, p. 7]. In March, 1983, attorney Robert H. McWilliams of Morgantown, West Virginia, filed a notice of appearance as local counsel on behalf of Petitioner. On October 19, 1984, attorney McWilliams filed a motion to withdraw as counsel for Dr. Mullen, citing, among other reasons, Petitioner's interference with the progression of the case [Motion to Withdraw dated 10/19/84]. In his affidavit, Mr. McWilliams stated that, despite advice to the contrary, Petitioner had prevented him from conducting discovery from March, 1983 through August, 1984, and had permitted only the submission of settlement offers [McWilliams Affidavit, p. 4].

On November 29, 1984, the District Court, again noting that nothing had been done in the case, ordered Petitioner to appear personally before the Court on December 19, 1984, to show cause why the action should not be dismissed for failure to prosecute [Order dated 11/14/84]. On December 19, 1984, Petitioner Mullen failed to appear personally, but was represented by attorneys Koppe and McWilliams. Attorney Koppe tendered to the Court a physician's letter regarding the medical condition of Petitioner and offered such letter as justification for Petitioner's absence [Transcript of Hearing, p. 3]. The letter stated that Petitioner was suffering from hypertension resulting from pushing a disabled automobile [Transcript of Hearing, p. 3; Letter from J. A. Nigro, M.D.]. Petitioner Mullen's pro se brief, however, states that he was not at the hearing because of a "kidney stone" [Appellant's Informal Brief, p. 2]. During the hearing, Petitioner's counsel, Robert McWilliams, stated that despite his advice to Petitioner that discovery was necessary to prepare the case for trial, Petitioner for-

bade him from doing any work other than the submission of settlement offers [Transcript of Hearing, p. 11]. Mr. McWilliams further stated that Petitioner, over several months, instructed him to wait for the Defendant to make the "first move" and to "bide their time" [Transcript of Hearing, pp. 11-14]. Mr. McWilliams mentioned that Petitioner maintained this position even after he was advised of Respondent's refusal of settlement [Transcript of Hearing, pp. 11-14]. According to McWilliams, Petitioner Mullen threatened to sue both Respondent's counsel, Herbert G. Underwood, and himself, if the case were not settled [Transcript of Hearing, p. 16].

Petitioner's counsel from Missouri, Peter J. Koppe, added that Petitioner was involved in thirty to forty law suits across the nation [Transcript of Hearing, p. 6]. Mr. Koppe concluded, "I think that the Court can see from the file that it has become significantly more difficult over the last several years to proceed with [Petitioner's] action" [Transcript of Hearing, p. 20].

Based on the record and the statements of counsel at the hearing, the District Court dismissed Petitioner's action with prejudice, concluding:

> (1) that [Petitioner's] attorneys had done everything "humanly and professionally possible" to represent [Petitioner];
>
> (2) that the prosecution of the case had been thwarted by the deliberate acts of [Petitioner]; and
>
> (3) that the primary goal of [Petitioner] appeared to be to force settlement rather than vindicate an alleged wrong.

[Transcript of Hearing, pp. 21-23]. Furthermore, the District Court granted Robert McWilliams' and Peter J. Koppe's motions to withdraw [Transcript of Hearing, p. 23].

On January 22, 1985, the District Court denied Petitioner's "Motion for Hearing on Criminal Charges Against Robert McWilliams" and "Motion for Change of Judge."

On April 9, 1985, Petitioner appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit. On May 13, 1985, the Fourth Circuit affirmed the District Court's decision, from which ruling Petitioner has filed this Petition for Writ of Certiorari.

SUMMARY 0F ARGUMENT

Under Rule 4l(b), a district court has authority to dismiss a case for failure to prosecute. The determination of what constitutes "failure to prosecute" is committed to the district court and can be disturbed only for abuse of discretion. Due to the deliberate efforts of Petitioner to coerce a settlement rather than to proceed to a disposition on the merits, there has been no development of this case since its filing almost five years ago. This failure to prosecute occurred despite the requests of Petitioner's counsel that they be allowed to prepare this matter for trial, and with knowledge of the District Court's comment that this matter not be further delayed. Such a case clearly warrants dismissal.

ARGUMENT

The Circuit Court Correctly Affirmed The District Court's Dismissal Of This Civil Action Because Petitioner Failed To Prosecute For Over Four And One-Half Years And Deliberately Thwarted Efforts Of His Attorneys And The Court To Develop The Case For Trial.

Under Rule 4l(b) of the Federal Rules of Civil Procedure, a district court unquestionably has authority to dismiss a case for want of prosecution, and may do so on its own motion. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (l962). Rule 4l(b) merely codifies the inherent power of federal

courts to prevent undue delays in the disposition of pending cases, docket congestion, and the possibility of harassment of a defendant. *Id.* at 630; *Santiago v. Rivera*, 553 F.2d 710, 712 (lst Cir. 1977). The decision to dismiss for failure to prosecute is committed to the sound discretion of the district court and such decision may be disturbed only where the court has abused its discretion. *Link*, 370 U.S. at 633-34; *Davis v. Williams*, 588 F.2d 69 (4th Cir. 1978).

In determining whether a case warrants dismissal under Rule 4l(b), the district court should balance the considerations of sound judicial administration against the public policy of deciding cases on their merits. *Davis*, 588 F.2d at 70. This balancing test requires the consideration of four criteria: (l) the degree of personal responsibility on the part of the plaintiff; (2) the amount of prejudice to the defendant caused by the delay; (3) the presence or absence of a "drawn out history of deliberately proceeding in a dilatory fashion"; and (4) the effectiveness of sanctions less drastic than dismissal. *Id.* Under this test, the District Court correctly dismissed the instant civil action. This case involves deliberate dilatory conduct on the part of the Petitioner resulting in a failure to prosecute for over four and one-half years. Such conduct occurred in spite of efforts by Petitioner's attorneys to prosecute the case and after repeated court inquiries regarding whether Petitioner desired to prosecute this matter.

In *Davis v. Williams*, 588 F.2d 69 (4th Cir. 1978), a suit by a prison inmate against prison officials alleging improper medical care, the Fourth Circuit held that where a plaintiff delayed trial for nearly two years without justification, the district court did not abuse its discretion in dismissing the suit with prejudice for failure to prosecute. In affirming the district court's decision, the court noted that the plaintiff had missed several medical appointments scheduled by the

prison officials since the instigation of the suit and had otherwise failed to cooperate. *Id.* at 70. The court concluded that the obstructive conduct of the plaintiff and the long history of delay distinguished the case from those cases where the court had set aside dismissals. *Id.*

Likewise, the instant case can be distinguished from those cases where dismissals have been set aside. The facts of this case reveal a far more compelling case for dismissal than *Davis*. The complaint alleging malpractice against Respondent Robert Skinner was filed on March 27, 1980, approximately five years ago. Two and one-half years later, on August 17, 1982, because there had been "no activity of record in connection with the development of the complaint," the District Court ordered that Petitioner, to prevent dismissal, submit within thirty days a written statement of an intent to prosecute [Order dated 8/17/82; Transcript of Hearing, pp. 6-7]. On September 15, 1982, Peter J. Koppe, Petitioner's attorney in Missouri, filed such notice of intent to prosecute and requested a trial date at "the earliest convenience" [Notice of Intent to Prosecute Case dated 9/8/82; Transcript of Hearing, p. 7]. Over the next two years, however, Petitioner did nothing to prepare the case for trial and, in fact, thwarted the efforts of his attorneys to prosecute the case.

In March, 1983, attorney Robert H. McWilliams of Morgantown, West Virginia, filed a notice of appearance as local counsel on behalf of Petitioner Mullen. This appointment was intended to help Petitioner and attorney Koppe move the case towards trial [Transcript of Hearing, p. 4]. Eighteen months later, on October 19, 1984, however, attorney McWilliams filed a motion to withdraw as counsel, citing, among other reasons, Petitioner Mullen's interference with the progression of the case [Motion to Withdraw dated 10/19/84]. In his motion, Mr. McWilliams stated:

> Pursuant to the direction of the [Petitioner], counsel has not been permitted to prepare this case from June, 1983, through late August, 1984, other than to submit settlement offers. As a consequence, this case is no further prepared today than it was over 14 months ago. This action of the [Petitioner] has made it unreasonably difficult for counsel to effectively represent the [Petitioner].

[Motion to Withdraw dated 10/19/84, p. 2]. In his affidavit, Mr. McWilliams verified Petitioner Mullen's conduct, stating that Petitioner had prevented him from conducting any discovery from March, 1983 through August, 1984, and had permitted only the submission of settlement offers [McWilliams Affidavit, p. 4].

On November 29, 1984, the District Court, again noting that nothing had been done in the case, ordered Petitioner Mullen to appear personally before the court on December 19, 1984, to show cause why the action should not be dismissed for failure to prosecute [Order dated 11/29/84]. On December 19, 1984, Petitioner failed to appear personally because of medical reasons, but was represented by attorneys Koppe and McWilliams [Transcript of Hearing, pp. 1-3]. During the hearing, both attorney Koppe and attorney McWilliams attempted to convince the court that Petitioner's deliberate dilatory conduct was due to mental instability or incompetence [Transcript of Hearing, pp. 15-17, 20]. Mr. McWilliams elaborated on the conduct of Petitioner which interfered with the prosecution of the case. Mr. McWilliams stated that despite his suggestions to Petitioner that discovery was necessary before settlement, Petitioner directed him to make settlement offer to Herbert G. Underwood, counsel for Respondent [Transcript of Hearing, p. 11]. Over the next several months, Mr. McWilliams was repeatedly instructed by Petitioner to do nothing but wait

and let the Respondent make the "first move" [Transcript of Hearing, pp. 11-14]. Mr. McWilliams further stated that in letters addressed both to Respondent's counsel Underwood and to himself, Petitioner threatened to sue if the case were not settled [Transcript of Hearing, p. 16]. Mr. McWilliams further stated that during a telephone conversation in which he informed Petitioner of his motion to withdraw as counsel, Petitioner responded, "I don't want anymore of your lip. Get it settled! Or I will sue you and Mr. Underwood" [Transcript of Hearing, p. 16].

Mr. Koppe's statements at the hearing also confirmed the deliberate dilatory conduct of Petitioner Mullen as well as Petitioner's eccentric and litigious nature. Mr. Koppe mentioned to the court that the Missouri Court of Appeals listed some thirty or forty cases involving Petitioner as party, or witness [Transcript of Hearing, p. 6]. Mr. Koppe also stated that in spite of the understanding that he was to aid Mr. McWilliams in case preparation, Petitioner removed him from the case when Mr. McWilliams was hired [Transcript of Hearing, pp. 4-5, 8-10]. Upon Mr. McWilliams' motion to withdraw, however, Petitioner again consulted Mr. Koppe [Transcript of Hearing, p. 5]. Mr. Koppe advised Petitioner that additional work was needed to prepare the case for trial [Transcript of Hearing, p. 5]. Petitioner then "fired" Mr. Koppe as his attorney in the case until Mr. Koppe was "hired" to attend the hearing of December 19, 1984 [Transcript of Hearing, pp. 3, 5]. Finally, Mr. Koppe concluded, "I think the Court can see from the file that it has become significantly more difficult over the last several years to proceed with [Petitioner's] action" [Transcript of Hearing, p. 20].

Thus, based on the case record and the hearing of December 19, 1984, the District Court dismissed the case with prejudice, concluding:

> [T]hat each of [Petitioner's] counsel have been thwarted by various and sundry actions of the [Petitioner] and have not been able to proceed with the development and the prosecution of this case.
>
> And that result has been the direct result of [Petitioner's] activities; the [Petitioner's] attempts to prevent the case from coming to trial. . . . [I]t would seem . . . that it was the [Petitioner's] primary goal to achieve some type of settlement of the case rather than to vindicate some alleged wrong . . . .

[Transcript of Hearing, p. 22]. Such actions by Petitioner Mullen are precisely the sort of behavior which Rule 41(b) is designed to prevent. The delay of over four and one-half years, the deliberately obstructive conduct of Petitioner and the failure of Petitioner to respond to the court's repeated efforts to "prod" the case toward trial make dismissal with prejudice the only appropriate sanction. Petitioner cannot now attack the District Court for failing to "prod" Petitioner more vigorously or Respondent for failing to conduct discovery. [Petition at p. 10]. The duty to prosecute rested with the Petitioner who intentionally failed to meet that duty.

CONCLUSION

For the foregoing reasons, Respondent Robert B. Skinner respectfully requests that Leo Mullen's Petition for Writ of Certiorari to this Honorable Court be denied.

Respectfully submitted,

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